

In the Matter of the Accusation)
of the)
)
DEPARTMENT OF FAIR EMPLOYMENT) Case No.
AND HOUSING)
)
 v.) E96-97 H-0572-00-se
) E96-97 H-0572-01-s
) C97-98-150
GREG JARVIS d.b.a. FATHOM BAR AND) 01-02-P
NIGHTCLUB, and GREG JARVIS, as)
Owner and as an Individual,)
)
 Respondent.)
-----)
)
JAMES L. THARP,)
)
 Complainant.)
)
)

DATED: January 18, 2001

FAIR EMPLOYMENT AND HOUSING COMMISSION

GEORGE WOOLVERTON

LISA DUARTE

CATHERINE F. HALLINAN

JOSEPH JULIAN

ANNE RONCE

HERSCHEL ROSENTHAL

In the Matter of the Accusation)
of the)
)
DEPARTMENT OF FAIR EMPLOYMENT) Case No.
AND HOUSING)
)
 v.) E96-97 H-0504-00-se
) E96-97 H-0504-01-s
) C97-98-150
GREG JARVIS d.b.a. FATHOM BAR AND)
NIGHTCLUB, and GREG JARVIS, as)
Owner and as an Individual,)
)
 Respondent.)
-----) PROPOSED DECISION
JAMES L. THARP,)
)
 Complainant.)
)
)

On October 3, 2000, the scheduled date of the telephonic pre-hearing conference, when reached by telephone by

the undersigned Hearing Officer, respondent Jarvis declined to participate, claiming lack of notice. At Jarvis' request, the Hearing Officer reset the conference for the next day. However, the following day, respondent Jarvis was not available at the telephone number he had provided. On October 9, 2000, the day before the hearing was to commence, respondent Jarvis left a telephone message with the Commission stating that he would not attend the next day's proceedings, due to an unspecified "business emergency."

On October 10, 2000, the hearing convened in Santa Barbara. Neither respondent Jarvis nor an attorney or representative for Fathom Bar and Nightclub appeared at hearing. The Commission received the hearing transcript on October 27, 2000, and the case was submitted that date.

After consideration of the entire record and arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On February 24, 1997, complainant James L. Tharp (complainant) filed two written, verified complaints with the Department of Fair Employment and Housing (Department) against Greg Jarvis and Fathom Bar and Nightclub, respectively. The complaints alleged that Greg Jarvis, Owner, and Jerry Hudson, Manager, verbally and physically sexually harassed complainant and terminated him for refusing their sexual advances, in violation of the Fair Employment and Housing Act (Act). (Gov. Code, §12900 et seq.)

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On February 24, 1998, Nancy C. Gutierrez, in her official capacity at that time as Director of the Department, issued an accusation against Greg Jarvis d.b.a. Fathom Bar and Nightclub, as Owner and as an Individual (respondent Jarvis). The accusation alleged that respondent Jarvis subjected complainant to unlawful employment discrimination on the basis of his sex, male, subjected complainant to verbal and physical sexual harassment, failed to maintain a sexual harassment prevention policy and failed to take any reasonable steps to prevent sexual harassment from occurring, in violation of Government Code section 12940, subdivisions (h)(1) and (i).

3. The Department served the Accusation and related papers on respondent Jarvis by certified mail on March 13, 1998.

4. On March 16, 1998, attorney Darla R. Anderson filed a Notice of Defense on behalf of respondent Jarvis individually and d.b.a. Fathom Bar and Nightclub. On November 23, 1999, Anderson notified the Commission and Department that she no longer represented respondent. On April 13, 2000, the Commission granted respondent Jarvis a continuance to engage new counsel, but respondent did not do so, and proceeded *in pro per*.

5. The Department noticed and took respondent Jarvis' deposition on July 26, 2000. At deposition, respondent Jarvis identified his residential address as "4695 Ellington, Ventura, California, 93003."

6. On August 22, 2000, the Department mailed a Notice of Hearing for the October 10, 2000, hearing to respondent Jarvis at 4695 Ellington Way, Ventura, California, 93003.

7. At all times relevant to the charges in the accusation, respondent Jarvis was an "employer" within the meaning of Government Code section 12940, subdivision (h)(3)(A). Respondent's business, Fathom Bar and Nightclub (Fathom Bar), was, at all times relevant, a sole proprietorship, owned by respondent Jarvis, and located at 423 State Street, Santa Barbara, California.

8. In the spring of 1996, complainant learned that respondent Jarvis was about to open a new "gay bar" in Santa Barbara. Complainant, having previous experience as a cocktail waiter, arranged for an interview. Complainant and his boyfriend "Greg" had known respondent Jarvis for several years in the Santa Barbara gay community.

9. In early May 1996, complainant met with respondent Jarvis, manager Jerry Hudson, and Jerry Miller, for a job interview. Jerry Miller's role at Fathom Bar was not established in the record. The first question posed to complainant at the interview was by Jerry Hudson, who asked, "How big is your dick?" Complainant responded, "Length or girth?" Hudson said, "Length." Complainant said "Seven inches." Hudson next asked, "Girth?" and complainant responded "Seven inches." Hudson, respondent Jarvis and Jerry Miller all laughed, as Hudson said, "You're hired." Although complainant tried to be "witty" in his answers, he thought Hudson's questions were rude, sexual and inappropriate. Nevertheless, complainant wanted to work at Fathom Bar, and accepted a position as a part-time cocktail waiter.

10. At an employee orientation held on May 10, 1996, manager Jerry Hudson told the newly-hired Fathom Bar employees that if they were caught having sex with each other, both employees would be fired immediately, but that they could have sex with management. Later during complainant's employment, both respondent Jarvis and Jerry Miller told employees, including complainant, that employees could not have sex with each other, but could do so with management.

11. Fathom Bar opened on May 14, 1996. Complainant worked four to five hours a night, two to four nights a week and earned \$4.35 per hour, plus tips. Part of complainant's job was to "socialize" with customers by having a "shot" of alcohol with them, if asked.

12. Another of the waiters' job requirements at Fathom Bar was to work wearing only boxer shorts underwear, every Wednesday night, as part of the bar's "Studs and Suds" promotion. Complainant believed that this dress was mandatory, on penalty of termination. On these nights, complainant felt vulnerable and exposed, as customers frequently groped and touched his crotch and buttocks, and several times, when complainant was carrying a tray of drinks, put their hands down his shorts. On Wednesday nights, manager Jerry Hudson often groped and touched the waiters, including complainant.

13. While complainant found working on Wednesday nights difficult and embarrassing, he otherwise enjoyed working at Fathom Bar. He liked socializing with the gay community in the bar and, on occasion, his boyfriend came to visit him at the bar.

14. Throughout complainant's employment, respondent Jarvis was present in the bar each night complainant worked. Jarvis frequently made unwanted sexual comments to and about complainant, such as, "You have the biggest dick," and "Oh my God, look at that," referring to complainant's anatomy. Several times, Jarvis grabbed complainant's buttocks. Complainant did not find Jarvis physically attractive and did not want Jarvis to touch him or make sexual advances to him.

15. On or about September 18, 1996, as complainant walked past respondent Jarvis with a tray of glasses, Jarvis grabbed his arm and pulled him into a small office, and shut and locked the door. Complainant dropped the tray and glasses, as Jarvis forced his hand into complainant's pants, kissed him, and put his tongue in complainant's mouth. Complainant pulled Jarvis' hand from complainant's pants, and pushed Jarvis' face away. Jarvis said, "No?" Complainant responded, definitively, "No." Respondent then asked, "Don't you want a daddy?"

Complainant replied, "Yes, I want a daddy. Buy me a car, put me in a penthouse. But I'm working here for my money." Complainant then unlocked the door and left the office. He and Jarvis did not speak again that night.

16. As a result of Jarvis' forcibly touching and kissing him, complainant felt physically ill, as if he were about to throw up. Complainant believed his job was in jeopardy because he had refused Jarvis' physical advance.

17. Complainant next spoke to respondent Jarvis on September 20, 1996, when complainant arrived at the Fathom Bar on an errand. As complainant walked past, respondent Jarvis asked, "When are you going to let me fuck your boyfriend?" Complainant was offended and disgusted by respondent Jarvis' remark. He told Jarvis, "You'll have to talk to Greg about that" and left the bar.

18. On complainant's next work day, September 21, 1996, complainant had trouble getting the attention of Chris, his bartender. Chris would not talk or even look at complainant, and would not take his drink orders. This was unusual, and complainant feared that he was being "set up" to be fired. Complainant filled his drink orders with the help of the "bar back," Sharon.

19. At the end of his shift on September 21, 1996, complainant drank two tequilas, recording them on his list of drink orders. He had made very little money that night, and felt frustrated by his bartender's treatment. Manager Jerry Hudson told complainant to go home, and that he, Hudson, would count complainant's money.

20. The next day, September 22, 1996, when complainant came into Fathom Bar, Jerry Hudson accused him of not recording some drinks on his list of drink orders. Complainant denied the charge, and showed Hudson that the orders were, in fact, all recorded. Hudson said that he would need to talk to respondent Jarvis, and took complainant off the work schedule for one week.

21. When complainant returned to work the next week, he found that he had been replaced. Complainant's last day of work was September 21, 1996, and respondent terminated complainant on that date.

22. After complainant's termination, he looked for work for approximately two weeks, but did not follow up on the couple of applications he had submitted, and abandoned his job search when he became ill. Complainant had previous longstanding physical and mental health problems, including depression, and

had taken medication for several years. After his termination and as a result of respondent's conduct, complainant became more depressed. He felt "distraught," lost energy, and became "non-functional and anti-social."

23. After his termination, complainant felt cut off and excluded, "like an outcast," from his support network of friends in the gay community who gathered at Fathom Bar. Complainant lost weight, became progressively more depressed, and eventually became seriously physically ill.

24. Commencing in October 1996, complainant received disability payments. Thereafter, he did not look for work.

25. In 1999, complainant was hospitalized for over a year, with non-pulmonary tuberculosis. By the time of hearing, complainant had recovered from this illness, and had regained the weight he had lost.

26. Some time after complainant's termination of employment, respondent Jarvis formed a corporation that assumed ownership of Fathom Bar. As of the date of hearing, Fathom Bar had closed and was no longer in business.

DETERMINATION OF ISSUES

Jurisdiction

The Commission has authority to proceed in a default case and may issue an order adverse to a respondent who does not appear at hearing to contest the Department's charges, providing that the Department establishes that it has effected proper service over respondent. (Cal. Code of Regs., tit. 2, §§7407, subd. (e), and 7430, subd. (b).)

The Department has shown that respondent was properly served with the accusation and related papers on March 13, 1998. On March 16, 1998, respondent filed a Notice of Defense. (Cal. Code of Regs., tit. 2, §§7412, 7407, subd. (e).) The Department also established that, on August 22, 2000, it mailed the Notice of Hearing to respondent at his residence at 4695 Ellington Way, Ventura, CA, 93003. This mailing was sufficiently in advance of the hearing date to constitute timely notice of the hearing. (Cal. Code of Regs., tit. 2, §7414, subd. (b).) Respondent received actual notice of the hearing, manifested by his message to the Commission on October 9, 2000, that he did not intend to appear on October 10, 2000.

Accordingly, the Department established that it effected proper service of the pertinent pleadings on respondent Jarvis. Thus, the Commission has jurisdiction to decide this case as a default proceeding,^{1/} and is authorized to issue an order adverse to respondent. (Cal. Code of Regs., tit. 2, §§7407, subd. (e), and 7430, subd. (b).)

Liability

A. Sexual Harassment

The Department alleges that respondent subjected complainant, a male, to verbal and physical acts of sexual harassment in violation of Government Code section 12940, subdivision (h). Sexual harassment constitutes discrimination "because of sex" within the meaning of the Act. (Gov. Code, §12940, subs. (a), and (h)(3)(C); Cal. Code of Regs., tit. 2, §§7287.6, subd. (b), and 7291.1, subd. (f)(1); Rojo v. Kliger (1990) 52 Cal.3d 65, 73, fn. 4; DFEH v. Madera County (1990) FEHC Dec. No. 90-03, at p. 19 [1990 WL 312871; 1990-91 CEB 1]; DFEH v. Fresno Hilton Hotel (1984) FEHC Dec. No. 84-03, at pp. 28-29 [1984 WL 54307; 1984-85 CEB 2].)

Same-gender harassment is unlawful under the Act. (Mogilefsky v. Sup. Ct. (1993) 20 Cal.App.4th 1409, 1418; see also Oncale v. Sundowner Offshore Services, Inc. (1998) 523 U.S. 75 [118 S.Ct. 998, 140 L.Ed.2d 201].) Discrimination "because of sex" includes same-gender sex harassment. (Ibid. at p. 77.)

If a preponderance of all the evidence demonstrates that unwelcome sexual conduct or other hostile or unwelcome conduct linked to sex has occurred, that this conduct led to the deprivation of an employment benefit or benefits, and that respondent can be held liable for these actions, respondent will be found to have engaged in unlawful sexual harassment.

1. Work Environment Sexual Harassment

Complainant, like all employees, is entitled to the benefit of a "discrimination-free workplace," a work environment free of harassment. (Cal. Code of Regs., tit. 2, §§7286.5, subs. (f), and (f)(3), and 7287.6, subd. (b).) Unwelcome sexual

1/ In a default proceeding, the Commission may base its decision upon the respondent's express admissions or upon other evidence introduced at hearing by the Department. (Cal. Code of Regs., tit. 2, §7430, subd. (a).)

conduct that deprives an employee of this substantial benefit is itself unlawful under the Act, whether or not the conduct also results in the loss of some more tangible employment benefit, such as a promotion, pay increase, or the job itself. (Cal. Code of Regs., tit. 2, §7287.6, subd. (b); Peralta Community College Dist. v. Fair Employment & Housing Com. (1990) 52 Cal.3d 40, 52; Rojo v. Kliger, *supra*, 52 Cal.3d at p. 73, fn. 4; Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 608; DFEH v. Donald Schriver, Inc. (1991) FEHC Dec. No. 91-11, at pp. 8-9 [1990-91 CEB 11], orig. decision affd. in part and revd. in part, Donald Schriver, Inc. v. Fair Employment & Housing Com. (1986) 220 Cal.App.3d 396.)

a. Whether Unwelcome Sexual Conduct Occurred

The Department asserts that respondent Jarvis subjected complainant to verbal and physical sexual harassment, consisting of unwelcome comments about complainant's physical appearance, unwanted sexual advances and physical touchings. This behavior, if it occurred, constitutes the kind of hostile sexual conduct that may form the basis for a sexual harassment violation under the Act. (Cal. Code of Regs., tit. 2, §§7287.6, subd. (b)(1), and 7291.1, subd. (f)(1); Peralta Community College Dist. v. Fair Employment & Housing Com., *supra*, 52 Cal.3d at p. 45, fn. 2; Fisher v. San Pedro Peninsula Hospital, *supra*, 214 Cal.App.3d at pp. 607-608; DFEH v. J & J King of Beepers (1999) FEHC Dec. No. 99-02, at pp. 12-13 [1999 WL 133270; 1999 CEB 1].

Complainant testified that, several days prior to his termination, respondent Jarvis pulled complainant into a room, forcibly kissed him, put his tongue into complainant's mouth, and forced his hand into complainant's pants.^{2/} Respondent also later made a sexually explicit comment about complainant's boyfriend, asking when he could "fuck" him. Throughout complainant's employment, respondent Jarvis had frequently made sexually explicit comments to complainant, such as "You have the biggest dick," and had several times grabbed his buttocks. Complainant also testified that during his employment, manager Jerry Hudson frequently made sexual comments, groped and touched him. Respondent Jarvis' and Hudson's comments and conduct were unwelcome and unwanted by complainant.

Complainant's demeanor and attitude on the witness stand while testifying were forthright and believable. He did not exaggerate either the circumstances or nature of the

2/ The Department's questioning placed this incident in July 1996. However, complainant's testimony, viewed in context, establishes that the incident took place on or about September 18, 1996, a few days before complainant's last day of work at Fathom Bar.

incidents to which he testified, nor did he omit potentially unfavorable details.^{3/} His testimony was corroborated in part by respondent Jarvis' deposition testimony.^{4/} Respondent Jarvis admitted at deposition that he was aware that Jerry Hudson had told Fathom Bar employees that they had to "sleep" with Hudson to keep their jobs. This lends credence to complainant's testimony that he believed that sex with management was expected at Fathom Bar.

The Department also offered respondent Jarvis' deposition testimony that Jerry Hudson was a "loose cannon," who engaged in unacceptable sexual behavior with employees. This supports complainant's testimony about Hudson's inappropriate physical gropings and unwanted sexual conduct. Respondent Jarvis' deposition testimony also acknowledged the existence of the "Studs and Suds" promotion, where the waiters wore only boxer shorts while they worked serving drinks to customers. Sufficient indicia exist, based on the record, to credit complainant's testimony that respondent Jarvis and Hudson engaged in the conduct to which complainant testified.

Accordingly, the Department has proven that complainant was subjected to unwelcome sexual conduct during his employment by respondent Jarvis, as credibly testified to by complainant and described in the Findings of Fact.

b. Deprivation of Discrimination-Free Work Environment

Unwelcome sexual conduct deprives its victim of a discrimination-free work environment when the conduct is sufficiently severe or sufficiently pervasive to alter the conditions of the complainant's employment by creating an intimidating, oppressive, hostile, abusive or offensive work environment or otherwise interfering with the complainant's emotional well-being or ability to perform his work. (Rojo v. Kliger, supra, 52 Cal.3d at p. 73, fn. 4; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at pp. 607-610, citing Meritor Savings Bank v. Vinson (1986) 477 U.S. 57 [106 S.Ct. 2399, 91 L.Ed.2d 49]; DFEH v. Fresno Hilton Hotel, supra, 1984-85 CEB 2, at pp. 29, 32-33.) The objective severity of the

3/ Complainant testified that at his job interview he was questioned about his penis size, and considered the questions rude, sexual and inappropriate. In his testimony at hearing, complainant did not downplay the ribald nature of his responses, and the fact that he responded with "in kind" sexual innuendoes. Therefore, it cannot be determined that complainant was an unwilling participant in the discussion about his penis size at the interview.

4/ Under the Commission's regulations, admissions by respondent may be used against him at hearing. (Cal. Code of Regs., tit. 2, §7430, subd. (a).)

harassment is judged from the perspective of a reasonable person in the complainant's position, considering all of the circumstances. (Oncale v. Sundowner Offshore Services, Inc., supra, 523 U.S. at p. 81.) The trier of fact's inquiry is guided by "[c]ommon sense, and an appropriate sensitivity to social context." (Id. at p. 82.) "In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." (Id. at p. 81.)

Complainant was aware, when he took the job at Fathom Bar, that it was a gay bar with a sexualized atmosphere.^{5/} Complainant did not believe, however, that his job gave respondent the right to engage in unwelcome sexual comments and sexually explicit conduct. In fact, complainant is fully entitled to protection from the sexually harassing employer, who takes advantage of the employment relationship to require accession to his sexual demands as part of continuing employment.

Complainant credibly testified that respondent Jarvis' and manager Hudson's sexual comments and inappropriate physical touchings occurred frequently throughout complainant's employment. Complainant further credibly testified that respondent Jarvis had sexually assaulted complainant, by forcibly kissing him, and putting his hand down complainant's pants. Jarvis later asked when he could "fuck" complainant's boyfriend. This unwelcome sexual conduct was pervasive, because Jarvis' and Hudson's sexual comments and touchings happened frequently over a four month period of time. Respondent Jarvis' explicit physical and verbal sexual conduct toward complainant was also severe, oppressive, and abusive, in that it reasonably offended, disgusted and demeaned complainant, and fundamentally altered the nature of his employment, making him fearful for his job.^{6/}

The unwanted sexual conduct rendered complainant's work environment subjectively and objectively hostile, abusive and offensive. Respondent thereby deprived complainant of a discrimination-free workplace within the meaning of the Act, in violation of Government Code section 12940, subdivision (h).

c. Deprivation of Employment

The Department argues that respondent Jarvis' unwelcome sexual conduct ultimately led to the deprivation of another employment benefit, complainant's job itself. The Department asserts that respondent Jarvis terminated complainant because he rejected respondent's sexual harassment.^{7/}

5/ Complainant testified that he was required to work in only boxer shorts one day a week, and that this dress led to groping by customers. Complainant testified that he felt uncomfortable and embarrassed, "like in a bad dream." Significantly, however, complainant also testified that he was not "offended" by the dress requirement. This decision need not reach whether respondent's boxer shorts requirement constitutes a violation of the Act, because the Department has established a hostile offensive work environment resulting from respondent's unwelcome sexual comments and physical touching of complainant.

6/ Complainant's fear was well-founded, because two days after rejecting Jarvis' physically explicit sexual advances, he was fired.

7/ During its closing argument at hearing, the Department moved to amend the accusation to add a violation of Government Code section 12940,

The Department must prove, by a preponderance of the evidence, that a causal connection exists between the unwelcome sexual conduct and an adverse action taken against complainant by respondent. The Department need not show that complainant's failure to acquiesce to the sexual conduct was the sole or even the principal reason for the adverse action. A violation is established if the action was caused at least in part by the unlawful motive. (Watson v. Dept. of Rehabilitation (1989) 212 Cal.App.3d 1271, 1289-90; DFEH v. Del Mar Avionics (1985) FEHC Dec. No. 85-19, at pp. 19-20 [1985 WL 62898; 1984-85 CEB 16]; DFEH v. J & J King of Beepers, supra, 1999 CEB 1, at p. 19.)

Complainant credibly testified that he was terminated within a couple of days of respondent Jarvis' grabbing and kissing him, which complainant rejected by pushing Jarvis away, and telling him "No." The termination closely followed Jarvis' question about "fucking" complainant's boyfriend, which complainant found offensive and disgusting. The temporal proximity of the events is persuasive evidence of a causal link between complainant's termination and his rejection of respondent's sexual demands. (Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at p. 615; DFEH v. Northrop Services, Inc. (1983) FEHC Dec. No. 83-11, at p. 9 [1983 WL 36460; 1982-83 CEB 12]); DFEH v. J & J King of Beepers, supra, 1999 CEB 1, at p. 14.) Moreover, the only reason respondent gave complainant for his termination, that complainant had not recorded some drink orders, was spurious, as established by complainant's list of drink orders and testimony at hearing.

Based on this evidence, the Department established that a causal connection between respondent's sexual harassment of complainant and complainant's termination. Respondent thereby violated Government Code section 12940, subdivision (h).^{8/}

2. Respondent's Liability

subdivision (a). The Department's motion is denied on the grounds that respondent Jarvis did not receive adequate notice of the proposed amendment. Jarvis was aware, however, of the Department's claim for backpay on complainant's behalf, as the backpay claim is set forth in the accusation. Also, complainant's administrative complaint asserts that respondent terminated complainant for refusing Jarvis' and Hudson's sexual advances.

- 8/ At hearing, the Department dismissed its Government Code section 12940, subdivision (i) allegation, on the ground that Fathom Bar was no longer in business. Accordingly, this decision does not reach whether respondent Jarvis may be liable for failing to take all reasonable steps to prevent harassment from occurring.

An employer is strictly liable under the Act for the harassing conduct of its agents and supervisors against any of its employees. (Gov. Code, §12940, subd. (h); Cal. Code of Regs., tit. 2, §7287.6, subd. (b)(2); Farmers Insurance Group v. County of Santa Clara (1995) 11 Cal.4th 992, 1014; Kelly-Zurian v. Wohl Shoe Company (1994) 22 Cal.App.4th 397, 414-15; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d at p. 608, fn. 6; Donald Schriver, Inc. v. Fair Employment & Housing Com., supra, 220 Cal.App.3d at 406.)

Both respondent Jarvis and Fathom Bar's manager, Jerry Hudson, sexually harassed complainant. Respondent Jarvis, as the owner of Fathom Bar and complainant's employer, is strictly liable for his own harassing conduct. Jerry Hudson, as manager, with supervisory authority over complainant, was complainant's supervisor and respondent's agent.^{9/} Respondent Jarvis is thus also strictly liable for Hudson's harassing conduct toward complainant. (Gov. Code, §12940, subd. (h); Cal. Code of Regs., tit. 2, §7287.6, subd. (b)(2).)

Respondent Jarvis is also personally liable under Government Code section 12940, subdivision (h), which provides that is unlawful for an employer or any other person to harass an employee or applicant. (Matthews v. Sup. Ct. of Los Angeles Co. (1995) 34 Cal.App.4th 598, 603; Page v. Sup. Ct. of Sacramento Co. (1995) 31 Cal.App.4th 1206, 1212.

Thus, respondent Jarvis is liable for the sexual harassment of complainant, in violation of Government Code 12940, subdivision (h). Respondent is further liable for unlawfully depriving complainant of his job itself, in violation of Government Code section 12940, subdivision (h).

Remedy

A. Make-Whole Relief

Having established that respondent Jarvis unlawfully harassed complainant in violation of the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury he suffered as a result of such discrimination. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse they assert to any part of these remedies. (Gov. Code, §12970, subd. (a); Cal. Code

9/ The Department established that Jerry Hudson was complainant's supervisor, who exercised disciplinary authority over complainant, as evidenced by his placing complainant on leave in September 1996.

of Regs., tit. 2, §7286.9; DFEH v. Madera County, supra, 1990-91 CEB 1, at pp. 33-34.)

The Department's accusation requested an award of back pay, damages for emotional injury, an administrative fine, and affirmative relief. At hearing, the Department did not pursue its request for an administrative fine, and thus none is ordered.

1. Backpay

The Department did not establish that complainant was available for work after his termination. He briefly looked for a job, but abandoned the attempt after two weeks. Because complainant was not available for work, no back pay is ordered.

2. Compensatory Damages For Emotional Distress

At the time the acts alleged in the amended accusation occurred, the Commission had the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$50,000 per aggrieved person per

respondent. (Gov. Code, §12970, subd. (a)(3).)10/ In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, §12970, subd. (b); DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, at pp. 10-14 [1988 WL 242635; 1988-89 CEB 4].)

Complainant credibly testified that respondent's sexual comments and advances made complainant uncomfortable and emotionally ill-at-ease. The evidence showed that respondent Jarvis' sexual assault on complainant made him feel physically ill, as if he were "about to throw up," and he became fearful that he was about to lose his job. The evidence further showed that Jarvis' question about "fucking" complainant's boyfriend, offended and disgusted complainant, and made him believe that Jarvis had no respect for complainant.

Prior to his employment with respondent, complainant had been treated for depression, and had been on medication for a number of years. As a result of respondent's sexual harassment, complainant's emotional state declined, and he became more depressed. Complainant testified that he had invested a lot of effort into his job at Fathom Bar, trying to make it work. Complainant testified that, as a result of the sexual harassment and his termination, he felt emotionally "tore ... up pretty bad." He became emotionally "distraught," experienced a loss of energy and became "non-functional and anti-social." Complainant further testified that, after his termination, he went through a particularly "tough time," feeling isolated and excluded, "like an outcast," from the support group of friends in the gay

10/ Effective January 1, 2000, the Legislature raised the \$50,000 limit for emotional distress/administrative fines in employment cases to \$150,000 per complainant per respondent. (Gov. Code, §12970, subd. (a).)

community who gathered at Fathom Bar. Complainant lost weight and became progressively more depressed.^{11/}

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), respondent will be ordered to pay complainant \$30,000 in damages for his emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)

3. Other Relief

The Department seeks that the Commission order respondent Jarvis to cease and desist from harassment in the operation of any future business, and to complete training in sexual harassment prevention.^{12/} These additional forms of relief are appropriate.

Respondent will be ordered to cease and desist from harassment and to undertake training in sexual harassment prevention. Respondent shall secure advance approval from the Department of the training provider, and the form and content of the training program. Respondent shall provide written certification of his completion of the training program to the Department and Commission. (DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 40; DFEH v. Del Mar Avionics, supra, 1984-85 CEB 16, at p. 34.)

ORDER

1. Respondent Greg Jarvis shall immediately cease and desist from harassment and discrimination based on sex.

2. Within 60 days of the effective date of this decision, respondent Greg Jarvis shall pay to complainant James L. Tharp actual damages for emotional distress in the

11/ Complainant eventually became severely physically ill and was hospitalized for tuberculosis. The Department does not assert that complainant's tuberculosis was caused by respondent's conduct, and this decision does not so find.

12/ In the accusation, the Department requested additional relief in the form of the development and implementation of a policy against sexual harassment, the posting of notices about sexual harassment in respondent's business, the training of respondent's employees, and the posting of the Commission's order. At hearing, however, the Department dropped its request for these remedies, on the basis that Fathom Bar was no longer in business. In its closing argument, the Department asked that respondent be ordered to undertake training in sexual harassment prevention in the operation of any future business ventures. This decision orders respondent to undergo such training.

amount of \$30,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

3. Within 60 days after the effective date of this decision, respondent Greg Jarvis shall attend a training program about prohibited harassment, the duty of all employers and supervisors to prevent and eliminate harassment, and the procedures and remedies available under California law. Respondent Greg Jarvis shall secure advance approval from the Department of Fair Employment and Housing of the sexual harassment training provider, and the form and content of the training and shall provide written certification of his completion of the training to the Department and Commission.

4. Within 100 days after the effective date of this decision, respondent Greg Jarvis shall in writing notify the Department and the Commission of the nature of his compliance with sections two and three of this order. Respondent shall also notify the Department and Commission of any change of address and telephone number.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, Title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: December 26, 2000

CAROLINE L. HUNT
Hearing Officer